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FOREIGN LAWYERS' RIGHT TO PRACTICE LAW IN CALIFORNIA: A PROPOSAL TO REMEDY PROTECTIONIST TREATMENT UNDER CALIFORNIA RULE OF COURT 988

PART I. INTRODUCTION

California Rule of Court 988 (the "California Rule")¹ authorizes qualified foreign lawyers to practice limited law in California without requiring that they become active members of the California State Bar Association (the "State Bar").²

An authorized foreign lawyer³ in California may practice *only the law of his or her admitting jurisdiction, not other foreign law or international law*.⁴ The California Rule's scope of

1. CAL. R. CT. 988. Originally adopted in 1987 and cosmetically amended in 1992, all references herein are to the current law.

2. See *infra* Part II.C.2.c.i.

3. CAL. R. CT. 988. Upon the State Bar's approval of a foreign lawyer's application, he or she may practice law as a Registered Foreign Legal Consultant (a "Legal Consultant"). See *infra* Part II.C.2.c.i.

4. The California Rule provides, in relevant part, that the Legal Consultant "may not . . . render professional legal advice on the law of . . . any jurisdiction other than the jurisdiction[s] named in satisfying the requirements of [this rule], whether rendered incident to preparation of legal documents or otherwise." CAL. R. CT. 988 (d)(5). See discussion *infra* Part II.C.2.c.iii.

The California Rule additionally prohibits, as do all foreign legal consultant rules, a Legal Consultant from practicing local law and advising as to certain transactions largely affected by local law. CAL. R. CT. 988(d) provides:

Subject to all applicable rules, regulations, and statutes, a Registered Foreign Legal Consultant may render legal services in California, except that he or she may not:

- (1) Appear for a person other than himself or herself as an attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer;
- (2) Prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States;
- (3) Prepare any will or trust instrument affecting the disposition on death of any property located in the United States and owned by a resident or any instrument relating to the administration of a decedent's estate in the United States;

practice is unlike the first foreign lawyers rule⁵ or the model rule,⁶ which authorize qualified foreign lawyers to practice *any law except the law of the licensing state or of the United States*.⁷ This seemingly small change by California acts to render the right of foreign lawyers from the European Union (the "EU") to practice in California illusory because of intervening, fundamental changes in the legal structure of the EU.⁸ Additionally, due to reciprocity requirements in various member states of the EU,⁹ the secondary effect has been to complicate or destroy California lawyers' chances for admittance to practice in the EU.¹⁰

The background section of this comment familiarizes the reader with the current situation surrounding U.S. foreign legal consultant rules.¹¹ The problem section then uses a hypothetical situation to demonstrate the special problem that the California Rule's restriction on scope of practice creates for lawyers from the EU, and because of reciprocity, for California lawyers seeking to practice in the EU.¹² The hypothetical clearly shows that under existing law, it is not possible for *any* foreign lawyer to qualify to practice EU law in California.¹³ The analysis section considers why the restriction

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- (4) Prepare any instrument in respect of the marital relations, rights, or duties of a resident of the United States, or the custody or care of the children of a resident;
 - (5) Otherwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any jurisdiction other than the jurisdiction(s) named in satisfying the requirements of subdivision (c) of this rule, whether rendered incident to preparation of legal instruments or otherwise.

Id.

5. The New York State rule regarding foreign lawyers' right to practice (the "New York Rule") was the first such rule in the United States. N.Y. R. Ct. § 521. See discussion *infra* Part II.C.1.

6. The American Bar Association (the "ABA") has recommended uniform foreign lawyer rules in the U.S. based on their own Model Rule for the Licensing of Legal Consultants (the "Model Rule"). American Bar Association Section of International Law and Practice report to the House of Delegates, *Model Rule for the Licensing of Legal Consultants*, 28 INT'L LAW. 207, 219-35 (1994) [hereinafter *Model Rule*].

7. See discussion *infra* Parts II.C.1. & II.C.4.

8. See discussion *infra* Part II.B.3.

9. See discussion *infra* Part II.D.2.

10. See discussion *infra* Part IV.B.3.

11. See discussion *infra* Part II.

12. See discussion *infra* Part III.

13. See discussion *infra* Part III.

was added and concludes that there are adequate control measures elsewhere in the rule.¹⁴ Also considered in the analysis section are whether the existing rule fulfills the joint purposes of foreign legal consultant rules¹⁵ and impediments to bilateral standardization.¹⁶ This comment then proposes amending the California rule to allow a greater scope of practice to qualified foreign lawyers.¹⁷ Only by allowing foreign lawyers a reasonable and practical opportunity to practice law can California expect reciprocal treatment for its lawyers abroad and hope to attract foreign legal talent to the local community.

PART II. BACKGROUND

A. *Prior Law*

Initially foreign lawyers were not allowed to practice law in any state of the United States without first becoming active members of the respective state bar.¹⁸ Foreign lawyers, however, could not qualify for admission without being U.S. citizens.¹⁹ This requirement of U.S. citizenship was eventually held unconstitutional by the United States Supreme Court in *In re Griffiths*²⁰ under the Equal Protection Clause of the Fourteenth Amendment.²¹ The *Griffiths* holding simply entitled the foreign lawyer to consideration for admittance. Foreign lawyers wishing to practice in the United States could still be required to attend an accredited U.S. law school and pass the bar examination.²²

14. See discussion *infra* Part IV.A.

15. See discussion *infra* Parts IV.B.2 & IV.B.3.

16. See discussion *infra* Part IV.C.

17. See discussion *infra* Part V.

18. See, e.g., CAL. BUS. & PROF. CODE § 6126 (West 1995) (“[a]ny person . . . practicing law who is not an active member of the State Bar, is guilty of a misdemeanor”); *Bluestein v. State Bar*, 529 P.2d 599 (Cal. 1974) (California lawyer suspended for aiding and abetting the unauthorized practice of law where he referred clients to a person not admitted to practice law in California). See also William R. Slomanson, *California Becomes Latest State to Consider “Foreign Legal Consultant,”* 80 AM. J. INT’L L. 197, 197 (1986) [hereinafter Slomanson, *Latest State*].

19. *In re Griffiths*, 413 U.S. 717 (1973) (foreign lawyer challenged Connecticut State Bar denying him admittance based on his citizenship).

20. *Id.*

21. *Id.*

22. *Model Rule*, *supra* note 6, at 213.

Some foreign lawyers tried to side-step state bar requirements, claiming that foreign law was not technically "law" within that state.²³ However, the California Supreme Court held that the practice of law includes advising on matters involving purely foreign law and is, therefore, prohibited by unauthorized persons.²⁴ Although foreign lawyers were largely shut-out in early years, various states inevitably started to realize the need for these same lawyers.

B. *Foreign Lawyers Needed*

U.S. lawyers usually deal exclusively with the law of their admitting state and applicable federal law.²⁵ These lawyers have little incentive to pursue the difficult path of learning fundamentally different foreign laws.²⁶ Nonetheless, there are a growing number of transactions entered into by people within the United States that may be affected by foreign law.²⁷ Foreign lawyers are the most obvious source of advice for these people. However, locating a reliable lawyer in a foreign country, which often involves communicating in a foreign language, is not practical nor economically efficient.²⁸ A special committee for law reform in New York commented on the need for foreign lawyers:

It is impossible to deal with the peoples of the world without coming within the operation of their law. Merchants and bankers . . . are compelled for self-protection to seek advice respecting foreign laws, yet it is no part of the nec-

23. See *Bluestein*, 529 P.2d at 606 (holding that "[g]iving legal advice regarding the law of a foreign country . . . constitutes the practice of law").

24. *Id.* An unauthorized person is anyone who was not an active member of the State bar. See *supra* note 18.

25. William R. Slomanson, *Foreign Legal Consultant: Multistate Model for Business and the Bar*, 39 ALB. L. REV. 199, at 201 n.11 (1975) [hereinafter Slomanson, *Foreign Legal Consultant*].

26. The fundamental difference between civil and common law has added to the problems of effectively regulating lawyers educated in one or the other. *Id.* at 213-14.

27. Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, Tbls. 1 & 2 (1995) [hereinafter *Annex on Legal Services*].

28. Note, *Foreign Branches of Law Firms: The Development of Lawyers Equipped To Handle International Practice*, 80 HARV. L. REV. 1284, 1285 (1967) [hereinafter *International Practice*].

essary equipment of a New York lawyer to know anything of foreign laws.²⁹

The California State Bar confirmed that foreign lawyers are needed in California for the following:

[To] provide ready access to competent advice on foreign laws applicable to international business transactions, . . . advise California businesses and individuals interested in investing abroad, . . . advise foreign nationals residing in California on the the [sic] law of their country, . . . advise California residents being transferred abroad, . . . assist federal and state agencies and courts with expert information on the law in foreign countries . . . [and] . . . expand the range of contact with foreign lawyers for California lawyers and law firms.³⁰

This need for foreign lawyers is also closely tied to the growth of legal services and international transactions.³¹ Additionally, changes in Europe have resulted in a new body of law specifically relating to transactions with member states of the EU.

1. *Growth of Legal Business*

The post-war period witnessed the beginning of the global expansion of business.³² During recent years, there has been an "explosive growth in the volume of international activity, and more particularly in the transnational flow of goods, services, labor and investment."³³ Specifically, the rate of global expansion in legal services over the last ten years has been exceptional.³⁴

29. Slomanson, *Foreign Legal Consultant*, *supra* note 25, at 201 n.11 (quoting *Report of the Committee on Law Reform*, 43 REPORT OF THE N.Y. STATE BAR ASS'N 215, 239-40 (1920)).

30. State Bar of California Office of Professional Standards, *Request that the Supreme Court Adopt New California Rule of Court 988, Relating to Foreign Legal Consultants, and Amend Rule of Court 952, Relating to Supreme Court Review of State Bar Determinations, and Memorandum and Supporting Documents in Explanation*, at 3 (October 31, 1986) [hereinafter *Request to Supreme Court*].

31. *Annex on Legal Services*, *supra* note 27, Tbls. 1 & 2.

32. *International Practice*, *supra* note 28, at 1285.

33. *Model Rule*, *supra* note 6, at 212; *Annex on Legal Services*, *supra* note 27, at 943.

34. *Annex on Legal Services*, *supra* note 27, at 944 & Tbls. 2 & 3.

2. *The International Transaction*

Transactions at the international level, by definition, will be affected by laws of more than one nation, and possibly by the growing body of international law regarding private transactions.³⁵ At a minimum, lawyers rendering legal advice to a client involved in an international transaction must consider whether another nation's laws or international law may affect the transaction and advise as to their conclusions. Effective legal advice to the client involved in international transactions takes the form of a seamless web, consisting, not of the law from one jurisdiction, but of many intertwined.³⁶

3. *Changes in Europe*

The unification of Europe has resulted in changes to the structure of law in the EU.³⁷ The EU is a "supranational body with independent authority to which the member states are subject."³⁸ Besides directives requiring member states to draft and pass conforming law, the EU organs may also promulgate regulations which "apply directly to the citizens, courts and governments of each Member State and therefore do not have to be transferred into domestic laws to have the force of law."³⁹ Member states consider EU regulations law analogous to U.S. federal law.⁴⁰

Previously, European lawyers had to know only the law of the country in which they were admitted to practice. Now, after the integration of Europe, practicing law in any member state of the EU may mean practicing EU law as well.⁴¹ However, even though various EU organizations were created under the EU charter document, the Treaty of Rome, there is no general, community-wide regulatory body for the legal

35. *Model Rule*, *supra* note 6, at 227.

36. *Id.* at 228.

37. *See generally* 1 FRANCIS SNYDER, *EUROPEAN COMMUNITY LAW*, 161-200 (1993).

38. *Id.*

39. *Id.*

40. *Model Rule*, *supra* note 6, at 228 n.59.

41. *See generally* SNYDER, *supra* note 37, at 161-200.

profession, much like U.S. lawyers.⁴² European lawyers are still admitted to practice by individual member states.⁴³

C. *Foreign Lawyer Rules in the U.S.*

Some individual states have enacted regulations in connection with local legal practice by foreign lawyers, but there is no nationwide rule.⁴⁴ New York was the first state in America to adopt a rule allowing foreign lawyers general authorization to practice law within its borders.⁴⁵

1. *New York*

The New York State Bar Association, the New York County Lawyers' Association, and the Association of the Bar of the City of New York proposed a foreign lawyer rule due to the emerging attitude requiring reciprocity in foreign countries.⁴⁶ New York fears were summed up by the Director-General of the International Bar Association when he commented:

[N]ew French legislation, which enables American legal firms to continue only if there are reciprocal arrangements made within five years for French lawyers to come to the United States, will be copied generally in Europe . . . [where there exists] considerable criticism of the present position under which United States lawyers are to be found practicing there in large numbers while the doors in the United States are closed to any European lawyer seeking to open his office there.⁴⁷

As remarked above, while American law firms and lawyers were able to take advantage of low barriers to entry in

42. Roger Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556, 579-80 (1992). The Council of the Bars and Law Societies of the European Community is only a general organization concerning the legal profession in the EU. *Id.* The Council coordinates all the national bar associations in the EU, i.e., they are a purely advisory organization. *Id.* Like the ABA in the United States, the International Bar Association in Europe has no definitive power.

43. *Annex on Legal Services*, *supra* note 27, at 963. American lawyers, like their European counterparts, may be members of a national bar association, but they are only "admitted" to practice by their individual state bar association.

44. *See Model Rule*, *supra* note 6.

45. *See Slomanson, Latest State*, *supra* note 18.

46. *Model Rule*, *supra* note 6, at 212-13.

47. Sir Thomas Lund, *Problems and Developments in Foreign Practice*, 59 A.B.A. J. 1154, 1157 (1973).

many foreign markets, foreign lawyers seeking to practice in the United States were largely prohibited.⁴⁸ New York changed this exclusion of foreign lawyers from U.S. markets.⁴⁹ Citing protection of American lawyers' interests abroad and New York's position as a leading international marketplace, New York adopted a rule allowing qualified foreign lawyers to practice limited law.⁵⁰

The New York Rule grants foreign lawyers a broad right to practice that is almost commensurate to the rights of full members of the bar.⁵¹ One of the few differentiating factors is that a licensed foreign lawyer in New York may not practice the law of the state of New York or U.S. federal law, except on the basis of advice from a person duly qualified and entitled to render professional legal advice in the State of New York.⁵²

2. *California*

a. *Part of the First Wave*

More than ten years after adoption of the New York Rule, Japan's new reciprocity requirement influenced other states to adopt foreign legal consultant rules.⁵³ The District of Columbia was the first to adopt a rule,⁵⁴ followed closely by California,⁵⁵ Hawaii,⁵⁶ Michigan,⁵⁷ and Texas.⁵⁸ Some, like the District of Columbia, were similar to the New York Rule, others, like California, varied key provisions.⁵⁹

48. *Model Rule*, *supra* note 6, at 212. See discussion *supra* Part II.A.

49. *Model Rule*, *supra* note 6, at 212.

50. *Id.* at 212-13.

51. N.Y. R. Ct. § 521. For an example of the general limitations on practice, see *supra* note 4.

52. *Id.* at subdivision 3(e). The New York Rule provides that a licensed legal consultant shall not:

[R]ender professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise), except on the basis of advice from a person duly qualified and entitled (other than by virtue of having been licensed under this Part) to render professional legal advice in this State on such law

N.Y. R. Ct. § 521.3(e).

53. See discussion *infra* Part II.D.1.b.

54. D.C. R. Ct. 46.

55. CAL. R. Ct. 988.

56. HAW. R. Ct. § 14.

57. RULES OF THE MICHIGAN BOARD OF BAR EXAMINERS, § 5(E).

58. RULES GOVERNING ADMISSION TO THE BAR OF TEXAS, RULE XVI.

59. *Model Rule*, *supra* note 6, at 214-15.

b. *State Bar Proposes Rule*

The California State Bar researched and recommended adoption of the California Rule.⁶⁰ The State Bar's proposal to the Supreme Court declared, "adoption of the proposed rule will benefit all segments of the California public and enhance California's status as an international financial and commercial center."⁶¹ The State Bar determined that California is a leader in international trade, is increasingly important as an international financial center and is, therefore, a natural location for "lawyers capable of providing expert legal advice on the laws of many lands."⁶² "Natural location" notwithstanding, a special committee, formed in 1982 to scrutinize the licensing of foreign lawyers,⁶³ reported to the State Bar that there was a "shortage of qualified lawyers with foreign legal experience" within California.⁶⁴

After listing many benefits to California of having qualified foreign lawyers within its borders,⁶⁵ the State Bar proposal, nevertheless, focused on reciprocity requirements.⁶⁶ Thus, allowing foreign lawyers to practice in California would "enable California lawyers to become licensed to practice in foreign jurisdictions which impose a reciprocity require-

60. *Request to Supreme Court*, *supra* note 30. In 1993, the State Bar requested *inter alia*, that the Court turn over the administration of the rule to the Board of Governors of the State Bar in order to "avoid[] burdening the Supreme Court whenever an amendment to the rules and regulations is necessary and allow[] needed changes to be executed at a more accelerated pace." State Bar of California Office of Certification, *Request that the Supreme Court Adopt Proposed Amendments to Rule 988, California Rules of Court (Registered Foreign Legal Consultant) and Memorandum and Supporting Documents in Explanation* (Dec. 1992) [hereinafter *Proposed Amendments*]. The Supreme Court, however, did not adopt the proposed amendments to the California Rule in whole, as recommended by the Board of Governors. *Id.* at 18; CAL. R. CT. 988(c)-(d). The Court instead made the California Rule a limited enabling rule, i.e., the Court retained the power to set eligibility requirements for certification and the 1987 limitations on scope of practice, not replacing either with the Board's recommendation that the Board of Governors have control. *Proposed Amendments*, Encl. 1.

61. *Request to Supreme Court*, *supra* note 30, at 3-4.

62. *Id.* at 3. California's position on the Pacific Rim and the existence of large businesses often engaged in international transactions make it attractive to foreign attorneys. *Id.*

63. Slomanson, *Latest State*, *supra* note 18, at 197 n.4.

64. *Request to Supreme Court*, *supra* note 30, at 3.

65. See discussion *supra* Part II.B.

66. *Request to Supreme Court*, *supra* note 30, at 3-4 & n.3.

ment."⁶⁷ This was desirable because California lawyers licensed to practice in foreign countries would help to:

[P]enetrates the complex and often opaque barriers to foreign trade and investment[,] . . . provide California individuals and businesses with a convenient and economical local source of advice about California and United States law[,] . . . help resolve legal problems [associated with complex international transactions] on a coordinated basis, providing significant new opportunities for local businesses and law firms . . . [, and,] as the number of California lawyers who have practiced abroad and returned expands, [raise] the general level of sophistication and service available to California clients.⁶⁸

In light of these findings, the California Supreme Court adopted the rule allowing qualified foreign lawyers limited practice within the state.⁶⁹

c. *The California Rule*

The California Rule was adopted as drafted by the State Bar Association, with only a few technical and stylistic changes.⁷⁰ The rule allows qualified foreign lawyers to practice on a limited basis without meeting the Legislature's usual "stringent requirements . . . including passing a final bar examination."⁷¹

67. *Id.*

68. *Id.* at 3-4.

69. CAL. R. CT. 988. Dissenting in the adoption of the California Rule, Chief Justice Bird states that while it is the inherent power of the court to admit and discipline lawyers, see *Hustedt v. Workers' Compensation Appeals Bd.*, 636 P.2d 1139 (Cal. 1981); *Merco Constr. Eng'rs, Inc. v. Municipal Court*, 581 P.2d 636 (Cal. 1978); *The People v. Turner*, 1 Cal. 144, 150 (1850), the Court has historically respected minimum standards set by the California State Legislature. *In re ADOPTION OF PROPOSED RULE 988 and AMENDMENT OF RULE 952(c), CALIFORNIA RULES OF COURT*, 737 P.2d 768 (Cal. 1987) (Bird, J., dissenting) (dissenting on the grounds that the majority overreached its inherent power to regulate the practice of law by infringing on the Rules of Professional Conduct as promulgated by the California Legislature). No majority opinion was published. *Id.*

70. *Request to Supreme Court, supra* note 30.

71. *In re ADOPTION OF PROPOSED RULE 988 and AMENDMENT OF RULE 952(c), CALIFORNIA RULES OF COURT*, 737 P.2d at 769 (Bird, J., dissenting) (citing the State Bar Act § 6060 generally and § 6060(f) specifically).

i. *Becoming A Legal Consultant*

According to the California Rule, a Legal Consultant qualified to practice in California is a person who is "admitted to practice and . . . in good standing . . . in a foreign country" and has been "issued a [currently valid] Certificate of Registration."⁷² The Certificate of Registration must be applied for by the foreign lawyer seeking to practice in California.⁷³ An application contains documentation seeking to prove the following: admittance to and good standing in a foreign country's bar for at least four of the six years preceding the application; actual practice of that country's law; and, the good moral character required of attorneys regularly admitted to the California Bar.⁷⁴ Once approved, a certificate is not *carte blanche* to practice all law, however. A Legal Consultant may practice law in California subject to certain express limitations regarding local law and scope of practice.⁷⁵

ii. *Local Law Practice Restrictions*

Under the California Rule, like most states' rules, a Legal Consultant may not engage in practice which may be affected by certain local law.⁷⁶ Thus a Legal Consultant may not: (1) appear in court;⁷⁷ (2) draft instruments for an action in court;⁷⁸ or, (3) prepare instruments affecting: (a) title to

72. CAL. R. CT. 988(a).

73. *Id.* at (c).

74. *Id.*

75. *Id.* at (d); see *supra* note 4 and accompanying text. The State Bar has the power to revoke a certificate in the event of non-compliance with any of the requirements of the rule. CAL. R. CT. 988(e).

76. *Model Rule*, *supra* note 6, at 226-27. EU community law allows member states to restrict the rendering of professional services, i.e., scope of practice, based on concerns regarding public order, safety and health only. Council Directive 77/249, art. 1, 1977 O.J. (L 78) 17. The types of services that lawyers may provide is only minimally restricted so that member states may choose to prohibit foreign lawyers from preparing formal documents relating to the administration of descendants' estates or the transfer of real estate interests. *Id.* at art. 1. Member states may also require that foreign lawyers, when practicing in legal proceedings, work in conjunction with a local attorney who is admitted to practice before the specific court and who is answerable to that authority. *Id.* at art. 5; see generally Valerie Pease, *Commission v. Germany*, 22 INT'L LAW. 543 (1988) (holding that Germany's requirement that foreign lawyers work "in conjunction" with a local attorney could not require that the German attorney assume the primary role of drafting and pleading and could not require collaboration with a German attorney where legal representation was not mandated).

77. CAL. R. CT. 988(d)(1).

78. *Id.*

realty located in the United States;⁷⁹ (b) the administration of a decedent's estate in the United States;⁸⁰ (c) marital relations, rights or duties;⁸¹ or, (d) custody or care of children of a resident of the United States.⁸²

iii. *Scope of Practice Restrictions*

A Legal Consultant's scope of practice is also restricted.⁸³ The California Rule, as submitted by the Special Committee to the State Bar, was patterned closely after the New York Rule.⁸⁴ Thus, the Special Committee, after intensive scrutiny of the situation concerning foreign legal consultants, proposed that Legal Consultants have a broad right to practice law, with the limitation that he or she may not "otherwise render professional legal advice on the law of this State or of the United States of America."⁸⁵ The State Bar directed the rule to the Office of General Counsel for redrafting, however, citing concern that "legal services beyond those authorized by the rule might be provided by a foreign legal consultant, particularly in foreign minority communities."⁸⁶ Other policing provisions in the California Rule allow the State Bar to revoke a Certificate of Registration if the Legal Consultant fails at any time to comply fully with the provisions of the rule.⁸⁷ In addition, the Legal Consultant is bound, by incorporation, to the law and rules of professional conduct of the state, which among other things prohibit the rendering of legal advice outside the lawyer's area of competence.⁸⁸

The proposal by the State Bar to the Supreme Court contained the General Counsel's revisions to the scope of practice.⁸⁹ Therefore, the California Rule includes the restriction that the Legal consultant "may not . . . render professional legal advice on the law of . . . any jurisdiction other than the jurisdiction[s] named in satisfying the requirements of [this rule], whether rendered incident to preparation of legal docu-

79. *Id.* at (d)(2).

80. *Id.* at (d)(3).

81. *Id.* at (d)(4).

82. *Id.*

83. *See supra* note 4.

84. *Request to Supreme Court, supra* note 30; N.Y. R. Ct. § 521.3(e).

85. *Request to Supreme Court, supra* note 30, Ex. 2.

86. *Id.* at 17.

87. CAL. R. CT. 988(e).

88. *Id.* at (d)(6)-(7).

89. *Request to Supreme Court, supra* note 30, at 18.

ments or otherwise.”⁹⁰ According to the California Rule, a Legal Consultant is limited to practicing only the law of the jurisdiction where he or she is admitted and in good standing for at least four of the six years immediately preceding the application.⁹¹

3. *Other States*

After the adoption of the California Rule in 1987 and a brief quiet period, several states adopted foreign lawyer rules between 1989 and 1992.⁹² The Alaska,⁹³ Connecticut,⁹⁴ Florida,⁹⁵ Georgia,⁹⁶ Illinois,⁹⁷ New Jersey,⁹⁸ Ohio,⁹⁹ Oregon,¹⁰⁰ and Washington¹⁰¹ rules reveal ever-increasing changes to the qualifications, requirements and limitations of the New York Rule.¹⁰² However, no other *key* international market in the United States contains the California restriction.¹⁰³

4. *Model Rule*

The tension created by reciprocity concerns in Japan and the EU and by the proliferation of divergent state regulations drove the ABA to appeal to individual state bars in pursuit of uniformity regarding the regulation of foreign lawyers.¹⁰⁴ Reciprocity laws impact the rate at which American lawyers are allowed to practice in foreign countries.¹⁰⁵

Uniform treatment is sought by the ABA from two groups of states: those that adopted rules more restrictive than the New York Rule, and those who have not yet adopted

90. CAL. R. Ct. 988(d)(5).

91. *Id.* at (c)(1).

92. *Model Rule*, *supra* note 6, at 214-15.

93. Rules of the Alaska Bar Association, R. 44.1.

94. CONN. R. Ct. §§ 24B-24E.

95. FLA. R. Ct. 16.

96. GA. R. Ct. Pt. D.

97. ILL. R. Ct. 712.

98. N.J. R. Ct. 1:21-9.

99. OHIO R. Ct. XI.

100. OREGON STATE BAR RULES OF ADMISSION, R. 10.05.

101. WASH. R. Ct. 14.

102. *Model Rule*, *supra* note 6, at 214-15.

103. The only states that restrict scope of practice by allowing the legal consultant to render legal advice only on the law of the jurisdiction where he or she is admitted to practice are Alaska, California, Connecticut, Florida, Georgia and Texas. *Id.* at 227 & n.56.

104. *Id.* at 215-19.

105. *Id.* at 215.

a rule.¹⁰⁶ For the first group, the Model Rule suggests corrections to existing rules by way of amendment; for the latter group, the ABA suggests the adoption of the Model Rule in the first place.¹⁰⁷ The Model Rule itself is patterned closely after the New York Rule¹⁰⁸ because the ABA deemed the New York Rule a success in meeting the original objective of such rules, namely to "afford . . . foreign lawyers a reasonable and practical opportunity to carry on an international legal practice in the United States and, in doing so, to grant them the functional equivalent of the rights sought by United States lawyers in other countries."¹⁰⁹

One of the most important variations from the New York Rule is the imposition of restrictions on the allowable scope of practice of a foreign lawyer.¹¹⁰ Thus, the Model Rule prohibits only:

[The] render[ing] of professional legal advise on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) except on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been licensed under this Rule) to render professional legal advice in this State.¹¹¹

Under the Model Rule, a foreign lawyer licensed to practice law in the United States could practice the law of any state (except the licensing state) or nation (except the U.S.), or international law.¹¹² The ABA proposed that, if American lawyers wished to compete in the global market, uniform treatment across state lines must be accorded foreign lawyers wishing to practice within the United States.¹¹³

D. *Other Countries' Foreign Lawyer Rules*

1. *Japan*

In 1986, for the first time, the historically tightly closed legal services market of Japan inched open the door to law-

106. *Id.* at 215-17.

107. *Id.* at 235. Some variations are acceptable to the ABA. *Id.* at 208.

108. *Model Rule*, *supra* note 6, at 235.

109. *Id.* at 215.

110. *Id.* at 227.

111. *Id.* at § 4(e).

112. *Id.* at § 4.

113. *Id.* at 235.

yers from foreign countries.¹¹⁴ The U.S. government had made legal services a priority in trade negotiations with Japan because access to American lawyers in Japan who have knowledge of the laws and business culture of Japan was considered critical for many businesses entering the Japanese market.¹¹⁵

a. *Scope of Practice Restricted*

Japan did not, however, swing the door wide-open to foreign lawyers.¹¹⁶ Their law allowed the admitted foreign lawyer to practice the law of the jurisdiction where he or she is admitted.¹¹⁷ Japan's interpretation of their new law concluded that U.S. lawyers allowed to practice under the new law were limited to the giving of advice on the laws of the jurisdiction in which they were admitted to practice, not any other U.S. state or U.S. federal law.¹¹⁸

b. *Reciprocity Required*

Permission for foreign lawyers to practice in Japan depends in part on reciprocal treatment.¹¹⁹ Thus, in determining whether to allow a foreign lawyer to practice in Japan, the Japanese Federation of Bar Associations, *Nichibenren*, considers how Japanese lawyers seeking to practice in the applicant's country of admission are treated.¹²⁰ The United States creates special problems because individual states regulate the lawyers within their jurisdiction differently; there has not been uniform "U.S. treatment" of foreign lawyers.¹²¹

Therefore, in the case of a U.S. applicant, Japan considers the treatment a Japanese lawyer would receive in the state where the U.S. lawyer is admitted, as well as, the five jurisdictions that Japan ostensibly views as primary.¹²² California, the District of Columbia, Hawaii, Michigan and New

114. *Annex on Legal Services*, *supra* note 27, at 963 n.101.

115. *Model Rule*, *supra* note 6, at 216.

116. *Id.* at 216 & 228.

117. *Id.* at 216; *cf.* CAL. R. CT. 988(d)(5).

118. *Model Rule*, *supra* note 6, at 228 n.58.

119. *Id.* at 214 n.11 (citing Gaidodu Bengoshi niyoru Horitsujimu no Toriatukai ni kansuru Tokubetsusochi Ho [Law Providing Special Measures for the Handling of Legal Business by Foreign Lawyers], Law No. 66 of 1986).

120. *Id.* at 214.

121. *Id.* at 216.

122. *Id.* at 214 n.11.

York.¹²³ Japanese lawyers seeking admission in these key markets must receive "substantially similar" treatment to the applicant who gains admission in Japan.¹²⁴ Faced with the possibility of disadvantaging American lawyers seeking to practice in the newly accessible Japanese market, the five jurisdictions identified by Japan quickly adopted legal consultant rules.¹²⁵

Imminent reciprocity concerns were abated by the promulgation of rules allowing foreign lawyers to practice at least the law of their jurisdiction within these U.S. states.¹²⁶ Restrictive provisions in some state rules, however, has left reciprocity relating specifically to the authorized scope of practice pressing.¹²⁷ Japan is not alone in basing treatment of U.S. lawyers on reciprocity; reciprocity requirements in the EU influenced New York in 1974 and continue to influence negotiations regarding legal services currently.¹²⁸

2. *Europe*

Developments in international legal services trade led to reciprocity being required in new law from member states of the EU.¹²⁹ As Europe integrated into the EU, community-wide rights of practice were developed for foreign lawyers from member states only.¹³⁰ The EU commission prohibited the exclusion of lawyers from EU member states when removing many barriers to the free flow of people and services according to their duty under the Treaty of Rome.¹³¹ The decision whether to exclude foreign lawyers from non-member states was left to individual member states, however, because of their right to regulate the legal profession within their own

123. *Id.*

124. *Model Rule*, *supra* note 6, at 214 n.11.

125. *Id.* at 214. See discussion *supra* Part II.C.2.a.

126. *Id.*

127. *Id.* at 216.

128. *Id.*

129. Goebel, *supra* note 42, at 560.

130. *Annex on Legal Services*, *supra* note 27, at 963-64.

131. Goebel, *supra* note 42, at 559-60. A foreign member state lawyer who has gained admittance to a member state bar is free to work in any state of the EU, as long as he or she complies with other education and qualification requirements. *Id.* at 596-98. In order to be qualified to provide legal services under various and differing member states regulations, member state lawyers have been greatly aided by the requisite value given to their professional diplomas and certificates attained in other member states. *Id.* at 612.

borders.¹³² Some member states have chosen to require strict reciprocity from non-EU foreign lawyers' states.¹³³

In an attempt to relax such strict reciprocity restrictions, the United States and the EU have engaged in extensive negotiations.¹³⁴ These negotiations have been to no avail, however, because of the chilling effect of the most favored nation problem under the General Agreement on Tariffs and Services (the "GATS").¹³⁵

E. *Impediments to Favorable Trade Relations*

After the conclusion of the GATS Uruguay Round, trade in legal services is regulated in much the same manner as other services.¹³⁶ The GATS established a framework for regulating legal trade, general rules concerning national regulation of such trade, and a set of schedules listing specific commitments applying to agreed upon service sectors.¹³⁷ Reaching more liberalized legal trade by following the GATS system requires that members include legal services in their schedule and that they also progressively reduce related trade barriers.¹³⁸

The most favored nation obligation under GATS mandates that all service suppliers receive treatment equal to that received by the most favored supplier.¹³⁹ The only occasion to avoid this mandate was the one-time opportunity to unilaterally restrict the most favored nation obligation from other members during the Uruguay Round.¹⁴⁰ If a member did not so exclude other members, then it is required to forward the least restrictive treatment to those members, even if that member maintains restrictive regulation.¹⁴¹ The cumulative effect, and one that was heavily criticized at the

132. *Annex on Legal Services*, *supra* note 27, at 962.

133. Goebel, *supra* note 42, at 561-64.

134. *Annex on Legal Services*, *supra* note 27, at 961-62.

135. *Id.* at 969.

136. For information beyond the scope of this comment, see generally, *Annex on Legal Services*, *supra* note 27.

137. *Id.* at 967.

138. *Id.* Members can negotiate for "market access" and "national treatment" rights for a service sector. *Id.* at 966. The service sector would be listed under either of these rights. *Id.* But see discussion *infra* Part IV.C (ramifications of listing a sector under either of these rights).

139. *Id.* at 964-65.

140. *Id.* at 965.

141. *Id.*

Uruguay Round negotiations, is that a member unwilling to reduce barriers in its own market may take a "free ride" along with the most lenient members reaching favorable trade relations bilaterally.¹⁴²

PART III. THE PROBLEM

A problem is created by the California Rule's strict restrictions on a Legal Consultant's scope of practice when the foreign lawyer is from the EU.¹⁴³ Consider, for example, the following hypothetical: California Client wants advice on the acquisition of a business located in the EU member state to which Legal Consultant is admitted.

Client will certainly need advice on the law of the member state. Under the California Rule, Legal Consultant is permitted to give this advice. With the integration of the EU, however, Client will also need advice on any EU law which may apply. This may be a significant portion of the transaction.¹⁴⁴ In addition to EU law, there is a growing body of international law which may apply to private transactions like Client's.¹⁴⁵ Theoretically, even if Legal Consultant considers EU and other international law and decides that none of it applies to the transaction, advising Client of this decision is itself the unlawful practice of law under the California Rule, since it is the rendering of legal advice concerning laws of a jurisdiction other than where Legal Consultant is admitted.¹⁴⁶

The California Rule permits Legal Consultant to advise Client as to the law of the country where Legal Consultant is admitted and then, arbitrarily, holds that California Attorney, a full member of the California bar, is the only person permitted to advise Client as to the law of the EU and other international law. Attorney is the only possible authorized lawyer who can render legal advice on the law of the EU since all lawyers from the EU are admitted only by member states, not the EU. There is no organization which regulates all EU

142. *Annex on Legal Services*, *supra* note 27, at 965.

143. *See* discussion *infra* Part IV.B.

144. *Model Rule*, *supra* note 6, at 228 n.59.

145. *Id.* at 227.

146. CAL. R. CT. 988(d)(5).

member state lawyers to which an EU lawyer could be admitted to fulfill California's Rule.¹⁴⁷

This result, that California Attorney alone may give legal advice concerning the EU to Client, occurs regardless of the fact that Legal Consultant may be more qualified to do so. If Legal Consultant had practiced only the law of their admitting state and never considered EU law (an unlikely scenario), Client is protected under other provisions of the California Rule because Legal Consultant is bound by the California laws and rules regarding professional conduct. Under the California Rule, Legal Consultant is required to be competent in the law they practice, and if incompetent, may be disciplined in the same manner as California Attorney, i.e., Legal Consultant may be sanctioned, or the certificate to practice may be revoked, if Legal Consultant is deemed incompetent.¹⁴⁸

Legal Consultant is left rendering advice on a fraction of Client's transaction. All other foreign laws affecting this transaction, with which Legal Consultant may not only be familiar but indeed skilled, must be left to a California Bar member. Client, in need of timely and cost efficient legal advice, must find another lawyer: a California bar member who is willing to advise on EU law. This bar member need not have special training, or be skilled, or even be overly familiar with laws affecting the transaction. Under the California Rule, Client must, however, rely on the California bar member, since no other lawyer can legitimately render legal advice concerning the EU.

There are few, if any, incentives for Client to ever find and retain Legal Consultant's services in the first place if the majority of the transaction for which he or she is retained requires a second attorney, who could also advise on the law of the Legal Consultant's admitting state and save finding a foreign lawyer at all. Since the restriction on the scope of practice has now defeated Legal Consultant's practice completely, the foreign lawyer's right to practice in California is seen for what it truly is: illusory. Thus, there are also few, if any, reasons for a foreign lawyer to apply for certification from the State Bar of California. In addition, Legal Consultant's admitting regulatory organization has seen through the

147. See *supra* notes 4, 42 & 43 and accompanying text.

148. See *infra* Part II.C.2.c.iii.

illusion and does not consider the California Rule to allow their lawyers abroad a reasonable or practical opportunity to render legal services. This disadvantages California lawyers in Legal Consultant's admitting jurisdiction.

As demonstrated by this hypothetical, the existing California Rule does not solve the original two-fold problem: remedying the lack of foreign lawyers in California and securing rights for California lawyers to practice abroad.

PART IV. ANALYSIS

Any solution which increases the number of foreign lawyers available to California clients and satisfies foreign countries demanding reciprocity must not sacrifice protection of the public seeking legal advice, nor the integrity of the legal profession. The EU Commission and several U.S. states have promulgated regulations which successfully increased the availability of foreign lawyers to their citizens involved in international transactions and which, at the same time, protect the public and maintain the integrity of the legal profession.¹⁴⁹ Such regulations have been successful because eligibility requirements, control provisions, and restrictions on scope of practice have been aimed at these concerns.

A. *Real Concerns are Adequately Addressed by Other Provisions*

Valid concerns of local bars are the protection of consumers of legal services from the dangers of unknowingly relying on advice by those who are not competent to give it, and the preservation of the integrity and public respect for the legal profession in general.¹⁵⁰

The several states who have adopted foreign legal consultant rules in the United States uniformly require recent and actual practice within the country to which the foreign attorney is admitted as a means of controlling the quality of legal services rendered to the public.¹⁵¹ This requirement effectively protects the public from foreign lawyers lacking current knowledge of the law by the following procedure: courts in foreign countries recognize locally known and reliable di-

149. See discussion *supra* Part II.C.1, 3, note 76 and accompanying text.

150. *Model Rule*, *supra* note 6, at 216 & n.23.

151. See discussion *supra* Parts II.C.1, 2.c.ii, 4.

plomas and allow the foreign lawyer to practice in local courts; U.S. rules then recognize that actual practice in foreign courts as indicative of education and qualification to practice the same law in the United States.¹⁵² This procedure assures local bars that the foreign attorney is indeed capable and competent to practice law and is not unfamiliar with recent developments in the foreign jurisdiction's law.¹⁵³

The California Rule, like others in the United States, incorporates the California rules regarding professional conduct, thereby requiring competency in all legal advice rendered.¹⁵⁴ Moreover, the California requirement of good moral character assures a minimum standard of professional character for the profession in general.¹⁵⁵ Good moral character is required from all lawyers seeking to practice in California, whether domestic or foreign.¹⁵⁶ This implies that its objective is to regulate the profession.

Restrictions prohibiting the practice of local law are valid because they are effective in maintaining the quality of advice concerning transactions dependent on local law; such restrictions are common to all foreign legal consultant rules adopted in the United States and the Model Rule.¹⁵⁷ Thus, prohibiting a Legal Consultant from preparing instruments affecting title to realty located in the jurisdiction, the administration of a decedent's estate in the jurisdiction, marital relations, rights or duties, or the custody or care of children of a resident of the jurisdiction, ensures the integrity of legal advice on matters governed by local law.

152. *Model Rule*, *supra* note 6, at 221-22.

153. *Id.*

154. *See infra* Part IV.B.1. Member states to the EU are able to protect the integrity of legal services provided to their citizens because any lawyer who takes advantage of the benefits of the Services Directive is subject to the rules governing professional conduct in that member state. *See* Case 33/74, *Van Binsbergen v. Van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299, 1309 (1975) (holding, *in obiter*, a State may prevent a foreign attorney from providing legal services where his purpose is to avoid professional rules of conduct that would apply to him if he were established in that State).

155. CAL. R. CT. 988(c)(2).

156. The California Rule requires the same good moral character of foreign legal consultants that any applicant seeking to become an active member of the State Bar is required to have. *Id.*

157. *Model Rule*, *supra* note 6, at 226 & n.54. There are slight variations in language from rule to rule and some rules contain additional restrictions. *Id.* This comment is not proposing changing a foreign lawyers right concerning the practice of local law.

The Special Committee recommendation that foreign lawyers be prohibited from practicing only the law of California and of the United States¹⁵⁸ is directly related to the regulation of the quality of legal services offered to the public. The local bar exam that attorneys admitted to the California Bar must take and satisfactorily pass, assures a standard level of knowledge and expertise with local law. Variations in state law are highlighted by the existence of different bar exams. Without administering an exam, local bars must rely on alternative methods in assuring themselves of the training of a foreign lawyer as to local or generally applicable federal law.

B. *Scope of Practice Restriction is not Aimed at Real Concerns*

Limiting the scope of practice to that of the law of the admitting foreign country was supposed to control unauthorized practice.¹⁵⁹ The justifications given by the State Bar for the extreme restrictions in the California Rule are pretextual. The State Bar was apparently less concerned with the unauthorized practice of law by Legal Consultants and more concerned with competition. This is demonstrated because, first, this "concern" is adequately met by other provisions of the California Rule. The additional restriction regarding scope of practice does not assist in controlling the unauthorized practice of law. Second, the restriction has destroyed the chance of a local pool of foreign lawyers as promised at adoption,¹⁶⁰ which a reasonable foreign legal consultant rule would have created, and reserved the California market for California bar members only.

1. *Restriction Does Not Control Unauthorized Practice*

Control provisions in the California Rule adequately and effectively give the power to revoke a certificate to the State Bar in case of unauthorized practice.¹⁶¹ Such control should have dispelled any valid concerns since, without a certificate, the practice of law by a foreign lawyer would constitute a mis-

158. See discussion *supra* Part II.C.2.b.

159. See discussion *infra* Part II.C.2.c.iii.

160. See discussion *infra* Part II.C.2.b.

161. CAL. R. Ct. 988(e).

demeanor.¹⁶² This is a significant disincentive to violate the provisions of the rule. Further, the rendering of legal advice outside a Legal Consultant's area of competence would expose him or her to professional liability,¹⁶³ as well as loss of his or her permission to practice law in California.¹⁶⁴ Any such liability, which would be covered by professional liability insurance, would also increase insurance premiums paid by the incompetent Legal Consultant. The cumulative result of the California Rule is a highly effective control on unauthorized practice which upholds the integrity of the advice given by foreign lawyers to consumers of legal services.¹⁶⁵

Indicative of the effectiveness of the control provisions found in the California Rule is the *lack* of problems along this line experienced in the EU and, for the past approximately twenty years, in New York.¹⁶⁶ In both places rules regarding foreign legal consultants are less restrictive regarding scope of practice than California and have similar control provisions to California.¹⁶⁷ There is no apparent connection between worries of unauthorized practice and additional restrictions on the authorized scope of practice.

2. *Restriction Destroys Promised Benefits to California*

Assuming the State Bar was not remedying concerns about the unauthorized practice of law when it adopted the current restriction on scope of practice, it is enlightening to consider the effect of such an extreme restriction. That effect has been to discourage foreign lawyers from becoming Legal Consultants and competing with California lawyers. Assuming *arguendo* that the actual effect of the restriction has been what was intended, the real intention behind the restriction on the scope of practice may have been protection of California lawyers' monopoly on legal advice concerning third country and international law.

162. See *supra* note 18 and accompanying text.

163. CAL. R. CT. 988(c)(7). Thus, a Legal Consultant must comply with the California Rules of Professional Conduct which state, in relevant part, that he or she shall not "fail to perform legal services with competence" as defined by the Rules to be the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service. See CAL. R. PROF. CONDUCT 3-110(A)-(B).

164. CAL. R. CT. 988(e).

165. *Model Rule*, *supra* note 6, at 229 n.60.

166. *Id.* at 215.

167. See discussion *supra* Parts II.C.1, 4.

If the rule was aimed at keeping foreign lawyers from practicing in California, it has been highly effective. Ten years after adoption of the California Rule, there are only ten Legal Consultants in all of California.¹⁶⁸ Comparatively, New York has experienced quite "considerable benefit to the development of New York as a center of international legal activity."¹⁶⁹ They have significantly increased the availability of foreign lawyers to local consumers of legal services. Ten years after adoption of the New York Rule there were over seventy legal consultants in New York City alone.¹⁷⁰ Today in New York State there are over 170 foreign lawyers registered as legal consultants.¹⁷¹

The State Bar of California, proposing to the Supreme Court that they adopt a rule permitting foreign lawyers to practice in California, expressed a desire to remedy the lack of qualified lawyers knowledgeable about foreign laws.¹⁷² The California Rule has grossly failed the State Bar's expectations that the rule would provide a pool of foreign lawyers to local consumers.

3. *Restriction Has Resulted in Few California Lawyers Abroad*

The rule has not resulted in great numbers of California lawyers working abroad either. The reciprocity required by some EU member states effectively keeps California lawyers from tapping the growing EU demand for legal services.¹⁷³ Delays in reaching favorable legal services trade with the EU has put California lawyers at a disadvantage already apparent.¹⁷⁴

The effect of EU Commission Directives has been to create easy access to a vast pool of EU lawyers knowledgeable of member states' laws but to leave a drought of lawyers competent to advise on the law of any American state.¹⁷⁵ Even so, presently there are approximately 263 New York lawyers

168. Telephone Interview with Rob Henderson, State Bar of California Staff Attorney (Jan. 16, 1996).

169. *Model Rule*, *supra* note 6, at 235.

170. Slomanson, *Latest State*, *supra* note 18, at 197.

171. *Model Rule*, *supra* note 6, at 214.

172. *See supra* Part II.C.2.b.

173. *Annex on Legal Services*, *supra* note 27, at Tbls. 1 & 3.

174. *Id.* at 963.

175. Goebel, *supra* note 42, at 606-25.

practicing law in the EU and twenty-nine in Japan.¹⁷⁶ Strikingly, there are only twenty-eight California lawyers practicing law in the EU and nineteen in Japan.¹⁷⁷ The differences in the number of lawyers in the EU cannot be due to differences in geography since California is, for the sake of comparison, as inconvenient to the EU as New York is to Japan. If the differences in numbers were due to geography, the difference in numbers of California versus New York lawyers in Japan would have been greater. This implies that while both California and New York have had marginal success in helping their lawyers gain access to Japan through reciprocity, only New York has been successful in the EU.

C. *Bilateral Negotiations Not Feasible*

Foreign legal consultant rules are an issue because U.S. attorneys are particularly concerned with access to Japanese and EU markets.¹⁷⁸ Although it may have been possible to reach favorable trade relations through negotiations with one or the other, or even both, at one point, since GATS it appears impossible.¹⁷⁹ The GATS has had a chilling effect on bilateral negotiations, prematurely stunting any lowering of legal service trade barriers between Japan or the EU and the United States because of the free-rider concern.¹⁸⁰

The effect of the EU or Japan and the United States agreeing to lower restrictions means that all other members get the benefits without compromising their own regulations.¹⁸¹ Therefore, Japan, the EU, and the United States have been unwilling to give up what they consider their trump card, their own market. It appears, therefore, that it is not feasible to bilaterally negotiate in order to assure that

176. Search of WESTLAW, West Legal Directory database (Jan. 17, 1996) (search for records containing "NEW YORK" in ADMITTED field and "FRANCE ITALY GERMANY ENGLAND SPAIN HOLLAND BELGIUM PORTUGAL GREECE DENMARK GREAT BRITAIN U.K. IRELAND LUXEMBOURG NETHERLANDS JAPAN" in COUNTRY field).

177. Search of WESTLAW, West Legal Directory database (Jan. 17, 1996) (search for records containing "CALIFORNIA" in ADMITTED field and "FRANCE ITALY GERMANY ENGLAND SPAIN HOLLAND BELGIUM PORTUGAL GREECE DENMARK GREAT BRITAIN U.K. IRELAND LUXEMBOURG NETHERLANDS JAPAN" in COUNTRY field).

178. See discussion *supra* Parts II.D.1-2.

179. See discussion *supra* Part II.E.

180. See discussion *supra* Part II.E.

181. See discussion *supra* Part II.E.

the Japanese and EU markets are accessible by American lawyers. In the same vein, a proposal to annex legal services under GATS was already rejected by other members.¹⁸² The United States has attempted and failed at lowering trade barriers; it is now in the hands of individual states. California, as a key international market, can favorably influence Japanese and EU market reciprocity by changing its own requirements.

PART V. PROPOSAL

In order to allow qualified foreign lawyers a broader scope of practice once admitted, the California Rule must be amended to allow Legal Consultants to practice any law except the law of California or of the United States of America. Therefore, the California Rule should be amended as follows (shown in legislative style):

(d)[AUTHORITY TO PRACTICE LAW] Subject to all applicable rules, regulations, and statutes, a Registered Foreign Legal Consultant may render legal services in California, except that he or she may not . . . (5) Otherwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, or the United States, whether rendered incident to preparation of legal instruments or otherwise.

California needs a viable foreign legal consultants rule, like the New York Rule¹⁸³ and the Model Rule.¹⁸⁴ The amended rule would be effective in meeting the original objective of foreign legal consultant rules to afford foreign lawyers a reasonable and practical opportunity to carry on an international legal practice. When this objective is met domestic lawyers seeking to practice in other countries are eligible for the functional equivalent of these rights.¹⁸⁵ When the rendering of legal services by foreign lawyers is regulated only to the extent actually needed, the door is left open for effective legal service by foreign lawyers. Foreign lawyers are desired in a community not just because they are able to advise on the law of their admitting jurisdiction, but also because they

182. See discussion *supra* Part II.E.

183. See discussion *supra* Part II.C.1.

184. See discussion *supra* Part II.C.4.

185. *Model Rule*, *supra* note 1, at 215.

are more likely to be skilled in the consideration and application of other laws affecting international transactions.

PART VI. CONCLUSION

The California Rule authorizes qualified foreign lawyers to practice only the law of their admitting jurisdiction.¹⁸⁶ Some foreign consultant rules and the Model Rule suggested by the ABA allow a qualified foreign lawyer to practice the law of any jurisdiction except for that of the licensing state or the United States.¹⁸⁷ Other jurisdictions have had success with this type of broader scope of practice.¹⁸⁸

The ABA has cited uniformity between foreign legal consultant rules within the United States as the crucial and initial step in breaking down the barriers to international trade in legal services.¹⁸⁹ Restrictive limitations on a foreign lawyer's practical right to practice law have been cited by both Japan and the EU as justifications for not lowering barriers to trade in legal services.¹⁹⁰ Although EU community organs may have the power to include American lawyers in the benefits of the free trade zone, it should not be surprising if they are reluctant to do so since important individual U.S. states exclude European lawyers from reasonable practice in the United States.¹⁹¹ Even if they were willing, any opportunity to bilaterally negotiate favorable trade relations was lost at the Uruguay Round of the GATS.¹⁹²

This comment has shown the history and motivation behind adoption of foreign legal consultant rules in various jurisdictions at various times.¹⁹³ It has further shown that changes were made by the State Bar to the version proposed by the Special Committee before recommendation to the California Supreme Court—changes that were unnecessary given other provisions of the rule.¹⁹⁴ This comment has revealed that the motivation for the restriction on scope of practice is,

186. See discussion *supra* Part II.C.2.c.iii.

187. See discussion *supra* Parts II.C.1, 3, 4.

188. See discussion *supra* Parts IV.B.2, 3.

189. See discussion *supra* Part II.C.4.

190. See discussion *supra* Part II.D.

191. See discussion *supra* Part II.A.

192. See discussion *supra* Part II.E.

193. See discussion *supra* Part II.C.

194. See discussion *supra* Parts II.C.2.b & IV.B.1.

at the least, unclear.¹⁹⁵ California has not reaped the promised benefits of either local foreign lawyers or easy access for California lawyers seeking admission abroad.¹⁹⁶

These dual objectives, as well as protecting the integrity of legal services provided to a vulnerable public, can all be realized without the restriction on scope of practice.¹⁹⁷ In fact, inclusion of the restriction has served to defeat the stated objectives.¹⁹⁸ For these reasons, this comment proposes amending the California Rule to allow qualified foreign lawyers to practice the law of any jurisdiction except that of California or the United States.¹⁹⁹

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195. See discussion *supra* Parts IV.A-B.

196. See discussion *supra* Parts II.B.2 & IV.B.3.

197. See discussion *supra* Part IV.

198. See discussion *supra* Parts IV.B.2-3.

199. See discussion *supra* Part V.